# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| DANJEL ENTERPRISES, LLC, a Washington state limited liability company,<br><br>Respondent,<br><br>v.<br><br>RUDOLPH I. VALDEZ, and JANE DOE VALDEZ, husband and wife and the marital community composed thereof,<br><br>Defendants,<br><br>FIDELITY NATIONAL TITLE COMPANY OF WASHINGTON, INC., a Washington state corporation,<br><br>Petitioner. | ) | No. 63267-1-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: August 16, 2010 |

Appelwick, J. — After a failed real estate transaction, Danjel sued Valdez and Fidelity, the escrow agent, to obtain $150,000 in earnest money. Fidelity asserts it never received the $150,000 earnest money from the buyer. Fidelity seeks discretionary review of the trial court's order on summary judgment that it deposit $150,000 into the court's registry. Whether the money was received is a genuine issue of material fact that precludes such an order. We reverse.

FACTS

Danjel Enterprises, LLC,[1] owns land in Snohomish County which it intended to sell to Rudolph Valdez for $3,380,000. The purchase and sale agreement entered into by the parties required a $150,000 earnest money deposit. Fidelity National Title Insurance Company of Washington, Inc., was denoted as the escrow and closing agent. The original closing date was June 29, 2007. The purchase and sale agreement required Valdez to deposit the earnest money once the inspection contingency was satisfied. It also provided that the earnest money would be released to the seller upon the waiver of the inspection contingency and was nonrefundable. However, after Fidelity prepared the escrow agreement, neither party signed it.

On June 11, Fidelity received a wire transfer of $150,000. Fidelity had been expecting a wire transfer of that amount for the Danjel-Valdez transaction. Believing the transfer was from Valdez, Fidelity faxed confirmation of the transfer to both parties' real estate agents, stating Fidelity still needed written authorization from both parties to release the earnest money. Fidelity alleges that, on that same day, its accounting department realized it had made a clerical error and transferred the $150,000 to the correct file.[2] However, the accounting department did not immediately notify the escrow staff.

On June 21, Valdez signed a rescission of the purchase and sale agreement. In a letter dated June 28, Danjel's attorney notified Fidelity of

[1] Danjel has two members, Vladan Milosavljevic and Lari-Anne Milosavljevic.
[2] The record does not reflect the precise date on which the accounting department notified the escrow staff of the error.

Valdez's rescission. Shortly thereafter, on July 19, Danjel's attorney requested the earnest money from Fidelity by letter. On July 24, the assistant vice president at Fidelity's Lynnwood branch e-mailed Thomas Hansen, Danjel's attorney, explaining it could not release the earnest money before the parties signed the escrow paperwork. The e-mail did not mention the clerical error from June 11. On September 10, Fidelity communicated to one of Danjel's agents that it had not received the earnest money. In his declaration, Milosavljevic also asserted Fidelity did not notify him of the clerical error until approximately September 10.

In a letter from Fidelity to Danjel's attorney, sent on December 7, 2007, Fidelity again explained that it had credited the wrong account for the June 11 wire transfer, that the funds were loan funds belonging to a different transaction, and that it had never received the $150,000 from Valdez. According to Jan Rohl, one of Fidelity's closing agents, no funds were ever deposited in Fidelity's escrow account for Danjel.

On February 13, 2008, Danjel filed a complaint against Valdez and Fidelity.[3] Danjel successfully moved for default judgment against Valdez. Danjel then moved for summary judgment against Fidelity in January 2009, requesting that the court require Fidelity to interplead the $150,000 in earnest money, find that Fidelity violated the Consumer Protection Act, chapter 19.86 RCW (CPA), and require Fidelity to pay prejudgment interest.

[3] Danjel's causes of action against Fidelity were breach of contract, negligent misrepresentation, violation of the Consumer Protection Act, chapter 19.86 RCW, and specific performance.

The court denied the motion as to the CPA, but ordered Fidelity to deposit $150,000 into the registry of the court, with interest at 12% from June 21, 2007. Upon Fidelity's CR 60 motion asking the court to vacate the summary judgment order as void, the court stayed its order pending appeal and required Fidelity to post a $150,000 bond. Fidelity sought discretionary review.

A commissioner granted Fidelity's motion for discretionary review of the trial court order requiring it to deposit $150,000 into the registry of the court. Review is on this limited issue only, under RAP 2.3(b)(2) ("The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.").[4]

DISCUSSION

Fidelity argues the court erred as a matter of law when it granted the portion of Danjel's motion for summary judgment that requested that Fidelity deposit $150,000 into the court's registry, because Fidelity never received the funds from Valdez.[5] We review summary judgment decisions de novo, viewing the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322 (2002). Summary judgment is appropriate when there is no

[4] As Fidelity's counsel noted in the hearing on its CR 60 motion, Danjel might be able to demonstrate that Fidelity was negligent in erroneously providing information to Danjel that it had the earnest money. However, Danjel's substantive claims against Fidelity are not the subject of the summary judgment order on review.

[5] While the order granting summary judgment does not cite RCW 4.44.480 as the authority under which the court ordered Fidelity to "deposit into the registry of the court $150,000" the parties agree that it was the basis for the trial court's order.

genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

RCW 4.44.480, the interpleader statute, provides:

> When it is admitted by the pleading or examination of a party, that the party possesses or has control of any money, or other thing capable of delivery, which being the subject of the litigation, is held by him or her as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Fidelity claims it never received the funds from Valdez and otherwise denies holding funds belonging to Danjel.[6]

The Court of Appeals applied RCW 4.44.480 in Rainier Nat'l Bank v. McCracken, 26 Wn. App. 498, 508–11, 615 P.2d 469 (1980),[7] to circumstances very similar to the current case. There, Rainier Bank had obtained a pretrial order requiring one of the other parties in the lawsuit to deposit proceeds from a real estate contract into the trial court's registry. Id. at 510. That party had consistently claimed title and right to the proceeds, and the issue of the title to the proceeds had not yet been judicially determined. Id. Looking to the language of RCW 4.44.480, the court concluded: "A party who claims title or right to funds in his or her possession cannot be compelled to pay such funds

[6] As noted in the ruling granting discretionary review, there is neither an outstanding judgment against Fidelity nor a prejudgment attachment proceeding.

[7] The court in McCracken also called into question an older case, First Nat'l Bank v. Baker, 141 Wash. 672, 252 P. 105 (1927), upon which Danjel relies, "because on the face of that ruling, and from the lack of any authority cited in the opinion to support it, it seems obvious that the deposits in court statute (the predecessor to RCW 4.44.480 set out above) was not cited to the court and was therefore overlooked." 26 Wn. App. at 510.

into the registry of the court in a summary manner, or be held in contempt for the failure to do so." Id. at 508.

Fidelity claimed it did not have any escrow funds for these parties. If this was true, the trial court was ordering Fidelity to pay its own money, not escrow funds, into the court registry. This it cannot do. Danjel has not shown, nor does the record contain, any evidence that Fidelity has "admitted by . . . pleading or examination" that it "possesses or has control" of money to which Danjel is entitled. RCW 4.44.480. Fidelity discovered the alleged clerical error before litigation ensued and has represented since then that it does not possess any funds to which Danjel has a right.

At best, Danjel seeks an inference that Fidelity possessed the funds from Fidelity's failure to assert the contrary at various points in time prior to September 10. For example, Fidelity discovered the error and credited the funds to the correct account, but it did not immediately notify Danjel. When Danjel demanded the escrow money, Fidelity only responded that it could not act before receiving written authorization from both parties to release the earnest money. These omissions are not admissions per se and do not satisfy the statute.

Further, the court's colloquy with Fidelity's counsel during the CR 60 hearing further demonstrates that the narrow issue before the court was only whether, as a matter of law, the court had authority to order Fidelity to deposit $150,000 into the court's registry, and not whether, as a factual matter, the alleged clerical error was a real clerical error:

THE COURT: Here is the problem, I think that the argument

> that has been made is sort of ignoring the facts. The facts are, in this case, that Fidelity confirmed, this is undisputed, confirmed repeatedly that it had $150,000 from Mr. Valdez, and then when the demand was made all of a sudden clerical error comes up.
>
> There is no way for a reviewing court to know whether that clerical error is a true clerical error or whether it's some kind of subterfuge.
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> MR. BUCK: Granted, your Honor. That is why it's a material issue of fact that has to be resolved by the trier of fact and not by the Court on summary judgment.
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> THE COURT: It wasn't resolved on summary judgment. The only thing that was resolved on summary judgment was to ask you guys to put the $150,000 into the Court registry.

Because Danjel did not ask the court on summary judgment to determine whether Fidelity ever actually received the $150,000 earnest money transfer from Valdez, the court only had authority to order Fidelity to interplead if Fidelity had admitted it controlled funds to which it had no right. Fidelity made no such admission.

We hold the trial court erred in granting Danjel's motion for summary judgment and ordering Fidelity to pay $150,000 into the court's registry. We reverse.

WE CONCUR:

Cox, J.